

FILED

APR 28 2005

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LENIN GARCIA,

Plaintiff,

v.

J. ABATTI-HARLOW, *et al.*,

Defendants.

NO. CV-F-01-5195-RHW-WMW-P

**ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS**

Before the Court is Defendants' Motion to Dismiss under the "nonenumerated" portion of Federal Rule of Civil Procedure 12(b). Defendants argue that Plaintiff's 42 U.S.C. § 1983 claim is premature as he has failed to exhaust all administrative remedies prior to filing his complaint, pursuant to 42 U.S.C. § 1997e. Since Plaintiff is proceeding *pro se*, the Court will liberally construe all of his claims for relief. *Ortez v. Washington County*, 88 F.3d 804, 807 (9th Cir. 1996). The Court grants Defendants' Motion to Dismiss.

BACKGROUND

On February 21, 2001, Plaintiff filed a Complaint *in forma pauperis* under 42 U.S.C. § 1983, acting *pro se*. (Ct. Rec. 1). The complaint alleged the Defendants violated his civil rights by denying his request to be housed with inmates of like ethnicity, retaliating against him for filing grievances, and acting with deliberate indifference to his medical condition in refusing him a lower bunk (Ct. Rec. 1, 17). Plaintiff then filed an Amended Complaint on December 3, 2001, which this Court dismissed partially with and without prejudice on February 10,

2003, ordering Plaintiff to submit a Second Amended Complaint (Ct. Rec. 16). Plaintiff's Second Amended Complaint was filed on March 7, 2003 (Ct. Rec. 17). The Court then directed service on the Second Amended Complaint and screened Plaintiff's complaint in accordance with 28 U.S.C. § 1915A (Ct. Rec. 18).

The Court found cognizable claims of relief under 42 U.S.C. § 1983 against Defendants Abatti-Harlow, Fouch, Vasquez, Ursenbach, and Hernandez for alleged retaliation and denial of equal protection, and against Defendants Barrier, Rossiter, Haskins, and Davis for alleged deliberate indifference (Ct. Rec. 18). Defendants filed this Motion to Dismiss on August 26, 2003 (Ct. Rec. 42). On September 17, 2003, Plaintiff filed a Memorandum of Opposition Motion to Defendants' Motion to Dismiss (Ct. Rec. 49).

Defendants opposed this filing as untimely, and moved the Court to not consider Plaintiff's reply or, in the alternative, to grant the Defendants sixty days to file a reply brief (Ct. Rec. 51). The Court found that Plaintiff's Memorandum in Opposition was timely filed, but granted the Defendants' request for sixty days to reply (Ct. Rec. 52). On February 7, 2005, Defendants timely filed their response to Plaintiff's Memorandum in Opposition (Ct. Rec. 53).

FACTS

Plaintiff's Complaint alleges several violations of his civil rights stemming from the Defendants' actions in the course of their employment as Correctional Officers (CO's) for the California Department of Corrections (CDC) (Ct. Rec. 17). Plaintiff's complaint includes several departmental appeals forms outlining the nature of the acts alleged and the internal, non-judicial remedies Plaintiff has already pursued in regard to those actions. *Id.* Plaintiff administratively appealed CDC actions regarding the ethnicity of the cellmate he was assigned, alleged retaliation from CO's, and failure to recognize his medical need to be assigned to a lower bunk. *Id.* Additionally, Plaintiff included appeals in his complaint that appear to have no relation to the instant case.

I. PLAINTIFF'S HOUSING APPEALS

Plaintiff filed numerous appeals challenging the CDC's decision to house him with a cellmate of a different ethnicity than his own. Initially, Plaintiff's formal appeal (to be housed solely with inmates of like, Puerto Rican, ethnicity, or those whose ethnicity was designated as "other") was partially granted by the California State Prison - Sacramento on November 14, 1997 (Ct. Rec. 17, Ex. B). Partial grant of Plaintiff's appeal indicated the policy of the prison to house inmates of like ethnicity as a "primary housing consideration," and his request was granted in accordance with this policy. *Id.* The record does not describe the original appeal resulting in this action, or when it was submitted. *Id.*

On February 17, 2000, Plaintiff was incarcerated at the Corcoran Substance Abuse Treatment Facility (Corcoran) (Ct. Rec. 17). Plaintiff verbally requested that he not be housed with an inmate of Mexican ethnicity, who was presented as his new cellmate. *Id.* Defendants CO Vasquez and CO Ursenbach refused Plaintiff's request, informing him he would be moved to administrative segregation ("the hole") if he refused to accept the new cellmate. *Id.* Later (there is no date indicated in the record) Plaintiff provided a copy of the partially-granted request from Sacramento to the Correctional Officers at Corcoran, who continued to deny his verbal housing request.

Plaintiff was then interviewed by Defendants, CO Abatti-Harlow and CO Fouch (Ct. Rec. 17). Again, the record does not indicate the date of this meeting, or if it constituted the "informal" level of appeal pursuant to CAL. CODE REGS. tit. 15 § 3084.5(a). *Id.* After the interview, Defendant CO Abatti-Harlow informed Plaintiff that if he did not accept the Mexican inmate, he would be placed in administrative segregation. *Id.* Plaintiff continued to refuse the housing assignment and, on approximately February 17, 2000, he was placed in administrative segregation and relieved of his prison job and pay grade. *Id.*

On February 20, 2000, Plaintiff formally appealed Defendants' decision

1 refusing his housing requests (Ct. Rec. 11, Ex. C). Plaintiff's appeal requested
2 that: (1) he be removed from administrative segregation and returned to his job
3 and pay grade; and (2) he be housed with inmates of like ethnicity (or other), and
4 that such inmates not smoke or be infected with hepatitis. *Id.* Plaintiff's appeal
5 was reviewed at all levels of formal review, up to and including the final
6 "Director's level" review. *Id.* At the first level of review, Plaintiff's request to be
7 removed from administrative segregation was granted on March 31, 2000 (Ct.
8 Rec. 11, Ex. C). However, at all levels of review, the remainder of Plaintiff's
9 appeal was denied on the following grounds: (1) no smoking is allowed inside
10 prison buildings and whether a cellmate smokes or not is immaterial; (2) those
11 prisoners with hepatitis who lived in the general population were cleared to do so
12 by prison physicians; (3) that he lost his pay grade and job due to his behavior
13 toward CO's, not because of his housing request; and (4) housing decisions were
14 based on safety, not racism. *Id.* Additionally, Plaintiff was informed that it was
15 the CDC's policy to discourage racism. *Id.* Plaintiff's requests were denied at the
16 Second Formal level of review on May 18, 2000, and at the Director's level on
17 December 11, 2000 (Ct. Rec. 17, Ex. C)

18 II. PLAINTIFF'S RETALIATION APPEALS

19 After Plaintiff's release from administrative segregation, and during his
20 appeals process (no specific dates are given in the record), Plaintiff alleged he
21 suffered retaliation from Defendants Hernandez, Abatti-Harlow, Fouch,
22 Ursenbach, and Vasquez for filing appeals generally and specifically regarding
23 their decision refusing his housing requests (Ct. Rec. 17). Plaintiff's complaint
24 alleges that his yard privileges were revoked, and he was generally threatened and
25 verbally abused as a result of his participation in the appeals process. *Id.*
26 Plaintiff filed appeals regarding the retaliation. *Id.*

27 //

28 //

1 Appeal No. 00-1201¹, submitted May, 5, 2000, alleged retaliatory
2 deprivation of Plaintiff's outdoor (yard) privileges, and threats, specifically by
3 Defendant Hernandez (Ct. Rec. 17, Ex. E). At the First Formal Level of review,
4 Appeal No. 00-1201 was denied after the prison administration found no evidence
5 of retaliation (Ct. Rec. 17, Ex. E). Plaintiff submitted this appeal to the Second
6 Formal Level on April, 26, 2000, but never submitted an appeal beyond the
7 Second Level review. *Id.* Plaintiff argues he was unable to respond to a Second
8 Formal Level review decision because he was transferred to a new facility prior to
9 the decision being made (Ct. Rec. 49).

10 III. PLAINTIFF'S MEDICAL APPEAL

11 In a separate matter, Plaintiff appealed the Defendants' refusal to assign him
12 a lower bunk, based on his medical condition (Ct. Rec. 17). On approximately
13 January 14, 2000, Plaintiff requested a lower bunk for a medical condition of a bad
14 back, resulting from wounds he suffered prior to incarceration, but his request was
15 denied by Dr. Nguyen (Ct. Rec. 11, Ex. O). In Appeal No. 00-00239, on January
16 14, 2000, Plaintiff appealed Dr. Nguyen's refusal to provide him with a lower
17 bunk. *Id.* Plaintiff's request to be assigned to a lower bunk was granted at the
18 First Formal Level. *Id.*

19 Plaintiff alleges that subsequently, on or about April 23, 2000, after a cell
20 transfer, Defendants, CO Haskins, CO Rossitor, CO Davis, and CO Barrier, all
21 refused to comply with his granted request to be assigned only to a bottom bunk,
22 and he was thereafter assigned to a top bunk (Ct. Rec. 17). Plaintiff alleges that he

23 ¹Plaintiff's Second Amended Complaint included an Appeal No. 1200,
24 which also complained of retaliation (Ct. Rec. 17, ex. E). However, in his
25 Memorandum of Opposition Motion to Defendants' Motion to Dismiss, Plaintiff
26 states that Appeal No. 1200 is not in relation to Defendant Hernandez, and is not
27 in regard to a named defendant in this suit (Ct. Rec. 51). Appeal No. 00-1200 was
28 not exhausted through a Director's level review (Ct. Rec. 17, Ex. Q).

1 submitted an appeal of the denial, on May 11, 2000 (Ct. Rec. 17, Ex. H).

2 This grievance was recorded in an unnumbered Appeals form, included in
3 Plaintiff's Second Amended Complaint as "Exhibit H." *Id.* It appears as though
4 this appeal was never filed as it displays no internal appeal number, signature, date
5 stamp, or any other indicator that it was received by Prison Officials (Ct. Rec. 17,
6 ex. H). Moreover, even if it was submitted, there is no evidence that it was
7 reviewed at even the First Formal Level (Ct. Rec. 17, ex. H).

8 **IV. PLAINTIFF'S UNRELATED APPEALS**

9 Finally, Plaintiff includes as exhibits in his Complaint several appeals forms
10 that appear to have no bearing on the instant case (Ct. Rec. 17, ex. M, N).
11 Appeals No. 99-03519 and 99-03444 are in regard to complaints on behalf of
12 other inmates for inadequate yard and visitation privileges and Officers' tampering
13 with Plaintiff's legal mail (Ct. Rec. 17, ex. M, N). Neither involve allegations
14 asserted in Plaintiff's Second Amended Complaint, and have no apparent bearing
15 on the case at hand (Ct. Rec. 17, ex. M, N). Additionally, neither complaint
16 appears to have passed beyond the First Formal Level of appeal (Ct. Rec. 17, ex.
17 M, N). Similarly, Appeal No. 00-1880 is a grievance against a "Captain Johnson"
18 for retaliation and abuse of authority (Ct. Rec. 17, ex. Q). It is not clear if this
19 appeal relates to his Retaliation claim against the named defendants, and even if it
20 was, this appeal has not passed through the First Formal Level of review (Ct. Rec.
21 17, ex. R).

22 **DISCUSSION**

23 **I. PRO SE LITIGANT**

24 Since Plaintiff is proceeding *pro se*, the Court will liberally construe all of
25 his claims for relief. *Ortez v. Washington County*, 88 F.3d 804, 807 (9th Cir.
26 1996).

27 **II. DEFENDANTS' MOTION TO DISMISS**

28 The Court must determine whether: (1) Plaintiff's Appeal No. 00-0722,

1 corresponding to his claim of denial of equal protection, is fully exhausted under
2 the California Code of Regulations to the extent required by 42 U.S.C. § 1997e;
3 and (2) Plaintiff's appeals corresponding to his claims of retaliation and deliberate
4 indifference are fully exhausted or excusably unexhausted.

5 **A. The Prison Litigation Reform Act**

6 The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e, provides:

7 No action shall be brought with respect to prison conditions under section
8 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983) or any
9 other federal law, by a prisoner confined in any jail, prison, or other
10 correctional facility until such administrative remedies as are available are
11 exhausted.

12 42 U.S.C. § 1997e(a); *see also*, *McKinney v. Carey*, 317 F.3d 1798 (9th Cir. 2002)
13 (holding that "this [statutory] language clearly contemplates exhaustion prior to
14 the commencement of the action as an indispensable requirement"). Courts do not
15 have discretion to excuse the exhaustion requirement. *Porter v. Nussle*, 534 U.S.
16 516, 524(2002). The exhaustion requirement applies to "all inmate suits about
17 prison life." *Porter*, 534 U.S. at 532. Even when monetary damages are
18 unavailable, an inmate still must exhaust administrative remedies. "Congress has
19 mandated exhaustion clearly enough, regardless of the relief offered through
20 administrative procedures." *Booth v. Churner*, 532 U.S. 731, 741 (2001).

21 **B. Federal Rule of Civil Procedure 12(b) Motion to Dismiss**

22 The exhaustion condition in the PLRA is an affirmative defense to be
23 proved by the defendants, rather than a pleading requirement. *Wyatt v. Terhune*,
24 315 F.3d 1108, 1717-18 (9th Cir. 2003). A plaintiff who fails to exhaust non-
25 judicial remedies that are not of a jurisdictional nature is subject to an
26 unenumerated Rule 12(b) motion to dismiss. *Wyatt*, 315 F.3d at 1719; *see also*,
27 *Ritza v. International Longshoremen's & Warehousemen's Union*, 837 F.2d 365,
28 368 (9th Cir. 1988).

C. Exhaustion of Administrative Remedies

In deciding a motion to dismiss based on failure to exhaust non-judicial remedies, the court may look to facts beyond the pleadings. *Wyatt*, 315 F.3d at 1720. If the court finds that the prisoner has not exhausted all prison administrative remedies, the proper remedy is dismissal of the complaint without prejudice. *Id.* at 1720.

The Ninth Circuit has addressed the issue of what constitutes an exhausted appeal on the part of an inmate in *Butler v. Adams* 397 F.3d 1781 (9th Cir. 2005). The Circuit held that if an inmate utilizes the administrative process made available to him or her, and so long as that process is correctly followed through to its final level, then 42 U.S.C. § 1997e requires nothing more to satisfy exhaustion. *Butler*, 397 F.3d at 1783.

In *Butler*, the inmate plaintiff was blind, and appealed the CDC decision not to make reasonable accommodations for his disability. *Id.* at 1781. The inmate completed all levels of review and then filed a claim in federal district court. *Id.* at 1782. The reviewing magistrate found "defendants lacked specific notice of plaintiff's statutory claims against them. Therefore, the plaintiff has failed to exhaust the claim at issue in this action." *Id.* at 1783. The district court dismissed the case after adopting the magistrate's recommendation. *Id.*

On appeal, the Ninth Circuit found the appeals forms provided to the inmate did "not require identification of any specific person." *Id.* The form only required the inmate to "describe the problem" and "what specific modification or accommodation is requested." *Id.* Having done exactly that, at all levels of review, the inmate followed the administrative process provided as instructed and needed to do no more to exhaust his administrative remedies. *Id.* The Circuit reversed and remanded. *Id.*

Accordingly, under the PLRA, the Plaintiff is required to correctly exhaust all administrative remedies made available to him by the CDC before this Court

1 may hear any complaint filed against the Defendants. The Defendants have
2 properly pleaded a Rule 12(b) motion to dismiss, setting forth evidence as to how
3 Plaintiff has not fully exhausted his administrative remedies prior to filing his
4 claim in the Court (Ct. Rec. 42).

5 **D. The CDC Administrative Appeals System**

6 An inmate under the jurisdiction of the CDC may “appeal any departmental
7 action, condition or policy which they can demonstrate has an adverse effect upon
8 their welfare.” CAL. CODE REGS. tit. 15 § 3084.1(a). The appeals process has
9 a four-level structure: (1) Informal Level, (2) First Formal Level, (3) Second
10 Formal Level, (4) Third Formal Level. *Id.* at § 3084.5(a-d).

11 At the informal level, the inmate and the staff involved with the complaint
12 attempt to resolve the issue through an informal interview. *Id.* at (a). The
13 Informal level is to be bypassed on appeal of “departmental regulations, policies,
14 or operational procedures” and “alleged misconduct by a departmental peace
15 officer.” *Id.* at (a)(3)(D)(G) At the First Formal Level, a formal written appeal is
16 filed and screened; the appeal is reviewed by a department official who did not
17 participate in the events being appealed and is not of lower rank than the
18 participating staff. *Id.* at (b), (e). The Second Formal Level (for review of denial
19 at the first level or for situation waiving the First Formal Level) is conducted by
20 the institution head or the regional parole administrator, or their designee. *Id.* at
21 (c),(e)(1). The Third Formal Level is to review issues not resolved in the Second
22 Formal level and is conducted by a designated representative of the departmental
23 director “under the supervision of the chief, inmate appeals.” *Id.* at (d), (e)(2).
24 Director’s level decisions at the Third Formal level are not appealable and exhaust
25 the inmate’s administrative remedies. CAL. CODE REGS. tit. 15 § 3084.1(a).
26

27 **1. Plaintiff’s Exhausted Appeal No. 00-0722**

28 Appeal No. 00-0722 was initially filed on February 20, 2000. Both Plaintiff

1 and Defendants agree that the appeal forms were properly completed, submitted,
2 reviewed, and decided at all levels of review, pursuant to CAL. CODE REGS. tit.
3 15 § 3084.1 (Ct. Rec. 17, ex. C; Ct. Rec. 42, ex. B). Defendants point out
4 Plaintiff's original appeal listed only Defendants Abatti-Harlow and Fouch (Ct.
5 Rec. 42). Defendants Vasquez and Ursenbach were not named in the appeal until
6 Plaintiff submitted a Second Level review (Ct. Rec. 42). Both of these factual
7 assertions are true, according to the official prison forms of Appeal No. 00-0722
8 exhibited in the record (Ct. Rec. 17, ex. C; Ct. Rec. 42, ex. B).

9 Defendants argue that one purpose of the exhaustion requirement under 42
10 U.S.C. § 1997e is to afford corrections staff an opportunity to address and resolve
11 complaints internally (Ct. Rec. 42); *citing, Porter*, 534 U.S. at 525. Based on the
12 facts in this case, Defendants conclude that the exhaustion requirement is met only
13 in regard to the Defendants named in the original appeal (Abatti-Harlow and
14 Fouch) and not Defendants Vasquez and Ursenbach, since they did not have an
15 opportunity to fully respond to claims against them internally (Ct. Rec. 42).

16 Defendants' assertion is incorrect. Under the Circuit's decision in *Butler*,
17 Plaintiff needed only to exhaust the administrative process *as provided* by the
18 CDC. *Butler*, 397 F.3d at 1783. Plaintiff is not required to do anything beyond
19 this process to exhaust his non-judicial remedies on this issue. *Id.*

20 Internal appeals forms provided to Plaintiff only required that he "describe
21 the problem" and declare the "action requested." (Ct. Rec. 17, ex. C; Ct. Rec. 42,
22 ex. B.) Subsequent levels of review only require the Plaintiff to explain his
23 dissatisfaction with the previous review process result, and invites him to add any
24 additional information or material. *Id.* The forms provided do not require the
25 Plaintiff to name specific individuals involved in the actions that form the basis of
26 the complaint and appeal. *Id.* Plaintiff fully complied with the administrative
27 process provided by the CDC in regard to Appeal No. 00-0722, and 42 U.S.C.
28

§ 1997e requires that he do no more. *Id.*; *Butler*, 397 F.3d at 1783.

This exhausted appeal addresses only the issue of Plaintiff's housing grievance, it does not state or discuss any grievance for retaliation (Ct. Rec. 17, ex. C). Therefore, this appeal has fully exhausted Plaintiff's administrative remedies only in regard to his § 1983 claim alleging that Defendants denied Plaintiff equal protection under the law by not complying with his housing requests. *Id.*

2. Plaintiff's Unexhausted Appeals No.'s 00-1880, 00-1201, 00-00239, 99-03519, 99-03444

Plaintiff refers in his complaint to several other appeals filed with the CDC relating to claims raised in his Second Amended Complaint (Ct. Rec. 17). However, nothing in the record indicates that these appeals have been fully exhausted through the Department's non-judicial administrative remedies.

Appeal No. 00-1201 regarding retaliatory deprivation of Plaintiff's outdoor (yard) privileges by Defendant Hernandez (Ct. Rec. 17, ex. Q). No. 00-1201 has not passed beyond the Second Formal level of review and has not been fully exhausted under the existing administrative remedies provided by the CDC. *Id.* Plaintiff argues that because he was transferred to another prison facility, he was unable to receive his response from the submitted Second Level appeal (Ct. Rec. 49). Plaintiff asserts that the failure of the CDC to deliver his Second Level decision to his new housing facility excused his need to exhaust all administrative remedies prior to filing suit (Ct. Rec. 49).

Plaintiff's assertion is incorrect. Courts do not have the discretion to excuse the exhaustion requirement on the grounds of "futility." *Porter v. Nussle*, 534 U.S. at 532. Although Plaintiff was moved and never received a Second Level decision, it does not excuse him from continuing to pursue his administrative remedies to exhaustion prior to filing suit. *Id.*; 42 U.S.C. § 1997e. Plaintiff's

1 claim of retaliation has not been fully exhausted under the available administrative
2 remedies.

3 Plaintiff's appeals corresponding to the claim of deliberate indifference are
4 similarly not fully exhausted (Ct. Rec. 17, ex. H). Additional appeals included in
5 Plaintiff's complaint have little or no bearing on the claims made, and are
6 nonetheless also unexhausted (Ct. Rec. 17, ex. M, N). Pursuant to 42 U.S.C.
7 § 1997e, the Plaintiff may not file suit under any of these claims until they are
8 fully exhausted under the administrative remedies provided by the CDC. 42
9 U.S.C. § 1997e.

10 **III. FAILURE TO STATE A CLAIM, 28 U.S.C. § 1915(E)(2)**

11 Courts of the United States may authorize a litigant to file a claim without
12 prepayment of fees and securities if the litigant submits an affidavit stating he is
13 financially incapable of paying such fees. 28 U.S.C. § 1915(a)(1). The court
14 "shall dismiss the case if the court determines that . . . the action or appeal fails to
15 state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).
16 "Dismissal for a failure to state a claim upon which relief can be granted is proper
17 'only if it is clear that no relief could be proved consistent with the allegations.'" *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993), *quoting*, *Hishon*
18 *v. King and Spalding*, 467 U.S. 69, 73 (1984). In making this determination, all
19 allegations of material fact must be taken as true, and construed in a manner most
20 favorable to the plaintiff. *Tanner v. Heise*, 879 F.2d 572, 576 (1989). The Court
21 must supply a plaintiff with a statement of the complaints deficiencies. *McGuckin*
22 *v. Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992). A *pro se* plaintiff will be given
23 leave to amend his complaint unless it is clear the deficient complaint cannot be
24 cured by such amendment. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d
25 621, 623 (9th Cir. 1988).

26 Given that the Plaintiff has exhausted his claim request relating to housing,
27
28

1 the Court must now determine whether the Plaintiff has stated a claim upon which
2 relief can be granted.

3 **A. Equal Protection Rights of Inmates**

4 The Supreme Court has held that “federal courts sit not to supervise prisons
5 but to enforce the constitutional rights of all ‘persons,’ including prisoners.” *Cruz*
6 *v. Belo*, 405 U.S. 319, 321 (1972). The Equal Protection Clause of the Fourteenth
7 Amendment holds that a state shall not deny to any person equal protection of the
8 law. U.S. Const. amend. XIV, *City of Cleburne v. Cleburne Living Center*, 473
9 U.S. 432, 439 (1985). The Supreme Court holds this is “essentially a direction
10 that all persons similarly situated should be treated alike.” *Id.*

11 CDC prison facilities are fully racially-integrated, and the California Code
12 of Regulations specifies “inmates, parolees and employees will not subject other
13 persons to any form of discrimination because of race, religion, nationality, sex,
14 political belief, age or physical or mental handicap.” CAL. CODE REGS. tit. 15
15 § 3004(c). The Supreme Court recently held that any inmate housing policy
16 based on racial segregation would have to meet a strict scrutiny analysis in order
17 to avoid not violating the affected prisoners’ equal protection rights. *Johnson v.*
18 *California*, 125 S. Ct. 1141, 1145 (2005). Prison housing policies and regulations
19 must treat all prisoners the same as “similarly situated” individuals regardless of
20 race, unless the policy or regulation can meet strict scrutiny. *E.g., Id.*

22 After their initial intake, inmates may request a specific cellmate and such a
23 request is usually granted unless there is some security reason for denying the
24 request. *Johnson*, 125 S. Ct. at 1145. However, “[m]any of the liberties and
25 privileges enjoyed by other citizens must be surrendered by the prisoner. An
26 inmate does not retain rights inconsistent with proper incarceration.” *Overton v.*
27 *Bazzetta*, 539 U.S. 126, 131 (2003). The liberty to live with whomever you
28 choose wherever you choose is a right prisoners no longer enjoy, being among the

1 “rights least compatible with incarceration.” *Id.*; see also, *Jones v. North Carolina*
2 *Prisoners’ Labor Union, Inc.* 433 U.S. 116, 125-126 (1977). Subsequently,
3 although CDC policy allows all prisoners to request a specific cellmate, the CDC
4 generally cannot establish a policy, or encourage a state amongst the prisoners, of
5 racial segregation. *Johnson*, 125 S. Ct. at 1145.

6 1. **Validity of Plaintiff’s Equal Protection Claim**

7 Plaintiff claims that the Defendants’ refusal to grant his request to be
8 housed with inmates of like ethnicity was discriminatory, as other prisoners were
9 allowed to live “with their own races.” (Ct. Rec. 17.) Construing his claim
10 liberally, Plaintiff is asserting that the denial of his housing request violated his
11 Equal Protection rights because he was treated dissimilarly from other ethnic
12 categories of inmates whose requests were granted (Ct. Rec. 17).

13 Even if Plaintiff’s complaint contains an Equal Protection claim, the
14 remedy he seeks would force the CDC to engage in unconstitutional behavior.
15 *Johnson*, 125 S. Ct. at 1145. Plaintiff’s claim would urge this Court to validate a
16 policy whereby inmates could create and enforce racially-segregated prison
17 housing, simply by requesting it (Ct. Rec. 17). To do so would be contrary to the
18 Supreme Court’s ruling that racial segregation in prisons is generally intolerable,
19 and any such policy must meet strict scrutiny to avoid violating inmates’
20 constitutional rights. *Johnson*, 125 S. Ct. at 1145.

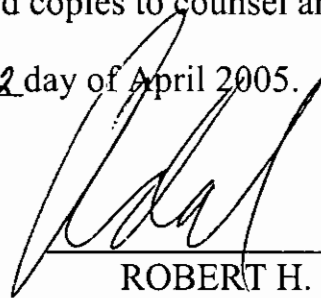
21 It is immaterial that, historically, the CDC may have granted race-based
22 housing requests (Ct. Rec. 17). The remedy that Plaintiff seeks would require the
23 CDC to allow racial segregation as a housing determination in the prison
24 population, an action the Supreme Court has found to be presumptively
25 unconstitutional. *Johnson*, 125 S. Ct. at 1145 (Ct. Rec. 17). A claim that requires
26 an unconstitutional remedy is a claim upon which no relief can be granted.
27
28

1 Having reviewed the record, heard from counsel, and been fully advised in
2 this matter, **IT IS HEREBY ORDERED:**

3 1. Defendants' motion to dismiss is **GRANTED**.

4 **IT IS SO ORDERED.** The District Court Executive is directed to enter
5 this Order and forward copies to counsel and to Plaintiff.

6 **DATED** this 22 day of April 2005.

7
8
9
10 
11 ROBERT H. WHALEY
12 United States District Judge
13
14
15
16

17 Q:\FRESNO CASES\Garcia\garcia.grant.order.wpd
18
19
20
21
22
23
24
25
26
27
28